Supreme Court, U.S.
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No. 91-780

In The
Supreme Court
of the
United States

OCTOBER TERM, 1991

William H. CURTIS and BRENDA M. CLAPP,
Administrators of the Estates of John A. Goff, Sr.
and Linda A. Goff, JOHN A. GOFF, Surviving Son,
and
GEORGE A. CLAPP, Guardian of
JENNIFER ANN GOFF and
SUSAN DEBORAH GOFF, Surviving Daughters of
John A. Goff, Sr. and Linda A. Goff,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

BRIEF FOR THE PETITIONERS IN REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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ARGUMENT IN REPLY

Respondent's Brief in Opposition states that while "the petition presents a number of proposed grounds for review, the only issues properly before this Court are the Georgia-law torts questions" (Opp. 3). The Petitioners whole-heartily agree that the issue before the Court is the extent to which the government's negligence is actionable under Georgia tort law. Petitioners are at a loss to understand just what other grounds for review the Petition purportedly raises, which in Respondent's view are not properly before the Court.

Applying Georgia tort law, Petitioners contend that the government is potentially liable under three tort theories, each of which was previously raised in Petitioners' Brief in Opposition to Motion to Dismiss in the trial Court. These theories include liability under the principle of plain negligence, liability under the Georgia Good Samaritan Doctrine, and liability under Georgia's application of the control theory of liability.

Accordingly, Petitioners contend that the FAA's negligent violation of its own procedures gives rise to a private cause of action. Respondent retorts that this argument was not presented in the trial court, and cannot be considered on appeal. Respondent is sorely mistaken.

Respondent can hardly contend that the concept of negligence as a basis for recovery against the government was not raised in the trial court. This is the fundamental concept on which the Petitioners' entire case was founded. Nor can respondent attack on this basis Petitioners' argument that the FAA's regulations themselves created a duty or standard of care against which to apply Georgia law. *Arney v. United States*, 479 F.2d 653 (9th Cir. 1973), stands for the proposition that the promulgation of safety regulations by the FAA creates a duty on

the part of the Federal Aviation Administration to conform to those regulations. This case is cited **repeatedly** in Petitioners' Brief in Opposition to the Motion to Dismiss. Further, this principle was restated in *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines) v. United States*, 692 F.2d 1205 (9th Cir. 1982), *rev'd on other grounds*, 467 U.S. 797 (1984), and the very language in *Varig* articulating the *Arney* principle is quoted in Petitioners' Brief in Opposition to Respondent's Motion to Dismiss. For the Court's reference, this Brief is reprinted in its entirety in the Appendix to this Reply. Respondent's contention that the Petitioners raised for the first time on appeal that a duty was owed them based on the FAA's own regulations, is grossly in error.

Beyond the fact that this issue was indeed raised in the trial court, Respondent's citation to *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 697 (1984) hardly precludes consideration of the issue. This case states the rule that the Court may properly consider questions not specifically passed upon by the lower courts, particularly where the case comes from the federal courts, *Youkim v. Miller*, 425 U.S. 231, 234 (1976) (per curium), where injustice might otherwise result, *Hormel v. Helvering*, 312 U.S. 552 (1940), or where a pure question of law is involved. *United States v. Southern Fabricating Co., Inc.*, 764 F.2d 780 (11th Cir. 1985).

Respondent also suggests that Petitioners' reliance on *Berkovitz v. United States,* 486 U.S. 531 (1988), is improper because Petitioners did not rely on this particular case in the Court of Appeals. Respondent cites no authority for its novel contention that the rules of appellate practice preclude reference to or reliance upon any case not cited to the intermediate appellate court. New issues are precluded. New cases are not.

To the extent the decision in *Varig* left room for argument otherwise, *Berkovitz* held that a federal agency can be held liable for negligent violation of its own regulations. As discussed above, this argument was in fact raised in Petitioners' Brief in Opposition to the Respondent's Motion to Dismiss. The Respondent's contention that either *Berkovitz* or the rule it propounds cannot properly be considered by this Court, is meritless.

Respectfully submitted,
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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

WILLIAM H. CURTIS and BRENDA M. CLAPP, Administrators of the Estates of John A. Goff, Sr. and Linda A. Goff; JOHN A. GOFF, JR., Surviving Son and GEORGE A. CLAPP, Guardian of JENNIFER ANN GOFF and SUSAN DEBORAH GOFF, Surviving Daughters of John A. Goff, Sr. and Linda A. Goff, *Plaintiffs,* v. THE UNITED STATES OF AMERICA, *Defendant.*	CIVIL ACTION FILE NO. 3:89-CV-146-GET

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

COME NOW Plaintiffs in the above-styled action and file this their Brief in Opposition to Defendant's Motion to Dismiss showing the Court as follows:

PROCEDURAL POSTURE

On December 4, 1989, the Plaintiffs filed their Complaint in the above-referenced case. On that same date, service by mail was sent to the United States Attorney

and the Attorney General of the United States by certified mail, return receipt requested. Both the U.S. Attorney and the Attorney General of the United States received the Summons and Complaint on December 7, 1989. Acknowledgement of Receipt of Summons and Complaint was executed on behalf of the United States of America on December 14, 1989. As of this dictation, the United States of America has not served any Answer or responsive pleadings, nor has the United States of America filed an Answer. Pursuant to Rule 205-3(a) of the Local Court Rules of the United States District Court for the Northern District of Georgia, the United States of America had through and including February 5, 1990 in which to file a timely Answer. Accordingly, at this time, the United States of America is in default. What may be more important, however, in the present circumstances is that pursuant to Rule 8(d) of the Federal Rules of Civil Procedure, the United States of America has admitted all of the allegations of Plaintiffs' Complaint.

On February 21, 1990, the United States of America served "Defendant's Motion to Dismiss" on the Plaintiffs. Pursuant to Consent Order, the Plaintiffs have been given through and including March 30, 1990 in which to respond to the Motion to Dismiss. Defendant's Motion to Dismiss is based on Rule 12(b)(1) and Rule 12(b)(6) of the Federal Rules of Civil Procedure, alleging lack of jurisdiction and failure to state a claim upon which relief can be granted. It appears from Defendant's brief that Rule 12(b)(1) and Rule 12(b)(6) are linked by Defendant's statement of the theory on which it seeks to be dismissed: "This Court lacks jurisdiction to hear Plaintiffs' suit because the Federal Aviation Administration owed no duty to Plaintiffs' decedents."

In the posture of a Motion to Dismiss, the Defendant's burden is to show beyond doubt that the Plaintiffs

can prove no set of facts in support of their claim which would entitle them to relief. *Hishon v. King & Spalding,* 467 U.S. 69 (1984); *Targett v. U.S.,* 551 F.Supp. 1231 (N.D. Cal. 1982); *Mortenson v. First Federal Savings & Loan Association,* 549 F.2d 884, 891 (3rd Cir. 1977). In this context, the Court may dismiss a Complaint only if it is clear that no relief can be granted under any set of facts that could be proved consistent with Plaintiff's allegations. *Hishon, supra.*

Along with this brief, Plaintiffs are filing an Amendment to the Complaint.

In analyzing the merits of the Defendant's Motion to Dismiss, the Court has a duty to construe all allegations of the Complaint, as amended, in the light most favorable to the Plaintiffs. So, even if the United States of America was not in default, the Court must accept the facts alleged in the amended Complaint as true. Further, the Court must also accept the reasonable inferences from those facts as true as well. *Illinois Migrant Council v. Campbell Soup Company,* 519 F.2d 391 (7th Cir. 1975) *rev'd on other grounds,* 574 F.2d 374 (1978). In so doing, the Court should bear in mind that under Rule (8) (a) (2) of the Federal Rules of Civil Procedure, the Plaintiff is required only to make a short and plain statement of the claims showing that the pleader is entitled to relief. "Notice Pleading" comprehends that the Complaint should give the Defendant fair notice of what Plaintiffs' claims are and the grounds upon which they rest. *Conley v. Gibson,* 355 U.S. 41 (1957).

> The purpose of the rule is to give notice to the other party and not to formulate issues or fully summarize the facts involved.

Clausen & Sons, Inc. v. Theo. Hamm Brewing Company, 395 F.2d 388, 390 (8th Cir. 1968).

A Complaint should not be dismissed unless it appears to a certainty that Plaintiff would not be entitled to relief under any state of facts which could be proved in support of his claim. If evidence may be introduced which would sustain a grant of relief to the Plaintiff, the Complaint is sufficient. *Alexander v. Unification Church of America,* 634 F.2d 673 (2d Cir 1980); *Investor's Syndicate of America, Inc. v. City of Indian Rock Beach, Florida,* 434 F.2d 871 (5th Cir. 1970). With this procedural background in mind, the facts and applicable law relating to Defendant's Motion to Dismiss can be addressed.

ALLEGED FACTS

On December 6, 1987, a Piper Cherokee Six aircraft bearing federal registration number N5587J crashed near LaGrange, Georgia due to engine malfunction. All four people on board were killed. Shortly before the crash the engine had been certified as airworthy and certified as having been overhauled by John W. Stroup, Jr. In the post-crash examination of the engine, it was determined that the overhaul of that engine and the certification of that engine as airworthy was either fraudulent or grossly negligent.

The FAA has had specific and repeated actual knowledge that John W. Stroup was utterly unqualified to work on aircraft engines or to certify them as airworthy over the course of many years. The FAA's failure to stop John W. Stroup, Jr. from overhauling and certifying engines borders on criminal negligence.

As far back as 1953, the FAA had problems with Mr. Stroup. The list of problems with which he has been involved, and the types of problems with which he has been involved, are frightening.

On January 30, 1953, his powerplant rating was denied due to a failure to correctly identify components.

On March 19, 1953 his powerplant rating was denied due to lack of knowledge concerning powerplants.

On July 10, 1953, his powerplant rating was denied due to an improper engine overhaul.

On September 14, 1953, he finally obtained a mechanic's certificate with a powerplant rating. On September 6, 1958 he obtained an airframe rating.

On January 31, 1961, his mechanic's certificate was suspended for sixty days for putting the **wrong** engine on an aircraft.

On March 29, 1971, the Southern Regional Counsel proposed to revoke his mechanic's certificate for improper engine overhaul including piston rings that were worn beyond specifications, severe corrosion on the intake and exhaust valve stems, and valve faces being worn beyond specifications.

On June 4, 1971, following an informal conference with the Regional Counsel's office, his certificate was suspended for six months. On December 15, 1971, that suspension was reduced to three months upon appeal to the National Transportation Safety Board law judge. That hearing revealed that Mr. Stroup did not have the correct overhaul manual while ordering parts for the engine, and he could not properly identify correct components for the engine.

On July 21, 1972, his powerplant rating was suspended for ninety days.

On March 15, 1974, it was proposed that his powerplant rating be revoked for improper overhaul of an engine which included cracks in the crankshaft propeller flange radius, the flange being bent in excess of approved

tolerances, and valves which had been ground beyond limitations. In an informal meeting with the Regional Counsel on April 3, 1974, Mr. Stroup stated he only signed off the logbook and that he did not assemble the engine, therefore he was not responsible (a clear violation of Federal Aviation Regulations).

On August 12, 1974, his mechanic's certificate and inspection authorization were both revoked. On May 16, 1975, the NTSB law judge upheld the revocation, but on September 12, 1975, the full board of the National Transportation Safety Board upheld the revocation of the inspection authorization, but suspended the mechanic's certificate for ninety days only.

On July 20, 1976, his powerplant rating was suspended for six months.

On March 17, 1978, his powerplant rating was revoked.

On December 13, 1982, his powerplant rating was again revoked.

On August 3, 1987 at the Air Center of Miami, another engine that Mr. Stroup had worked on had serious problems. The investigation disclosed that he had failed to use proper maintenance techniques and procedures; the engine was not at least equal to its original properly altered condition and was not airworthy; that he had made several fraudulent entries in the maintenance log, and that he had failed to enter his certificate number into the logbook. These facts were all available to the FAA and yet the FAA waited until October 2, 1987 to exercise its emergency powers issuing an order revoking his mechanic's certificate. That order was ultimately affirmed by the full board of the NTSB by order of January 20, 1988.

The FAA had actual knowledge of this extensive history of serious infractions of the Federal Aviation Regulations. These infractions were not of a minor or hypertechnical type. Rather, these infractions were as fundamental as certifying that work had been done when it had not been done, putting the wrong engine in an airplane, being unable to identify the appropriate components to be put into an aircraft engine and fraud. The Federal Aviation Administration was negligent in allowing John W. Stroup, Jr. to have any authority to work on or inspect engines of any sort. Nonetheless, on October 1, 1987, one day before the Federal Aviation Administration revoked his certificate, John W. Stroup signed the logbook of the engine involved in the subject crash certifying that the engine had been overhauled and certifying that the aircraft was airworthy. That certification is the pilot's guarantee that the maintenance has been conducted in accordance with the Federal Aviation Regulations and the manufacturer's specifications, and that all of those requirements have been fully met, i.e. that the aircraft is airworthy. When the mechanic signs off in a logbook, he is required to list his Federal Aviation Certificate number along with his signature in the logbook. That is the pilot' s guarantee that the person doing the work on the engine and/or the person inspecting the engine have been diligently tested and inspected by the Federal Aviation Administration and that the FAA has found them to be competent and capable.

No pilot would ever have his aircraft's maintenance accomplished and/or inspected by a mechanic who was not certified by the Federal Aviation Administration. First, to do so would be foolish. Secondly, if the work has not been done by a FAA certified mechanic, and if the work has not been inspected by a FAA certified mechanic, then the aircraft is not legally airworthy.

If the FAA had not reinstated John W. Stroup, Jr.'s mechanic's certificate, he would not have been in a position to release an aircraft for flight which was not airworthy, and the four people involved in this crash would still be alive. If, after the August 3, 1987 incident, the FAA had immediately revoked his certificate, he would not have been in a position to release an aircraft for flight which was not airworthy, and the four people killed in this crash would be alive today. If the FAA had made a simple telephone call to the owners of an aircraft overhauled and released the day before John W. Stroup's certificate was the subject of an order of emergency revocation, there would have been an opportunity for the owners of the aircraft to have it double-checked by a competent mechanic and the four people killed in the crash would be alive today.

In fact, John W. Stroup, Jr.'s repeated flagrant violations of the Federal Aviation Regulations have rendered him uninsurable. Not only is he uninsured for this accident, he is judgment-proof due to a long string of unsatisfied judgments on the general execution docket of his home town. The Federal Aviation Administration, with actual documented knowledge of his total inability to provide for the safety of flight, has allowed him to continue even though he has no financial responsibility for his acts.

ARGUMENT AND CITATION OF AUTHORITY

The United States of America seeks to avoid any responsibility for the deaths in question by arguing that it owed no duty to the people who died on that airplane. The government's position is both morally and legally insupportable.

I.

THEORY OF PLAINTIFFS' CASE

Under the Federal Tort Claims Act (FTCA), 28 USC §§ 1346(b) and 2671 et seq., the United States of America has waived its sovereign immunity "where the United States, if a private person, would be liable to the claimant in accordance of the law where the act or omission occurred." 28 USC § 1346(b). The law requires us to look first to the state where the government's act or omission occurred and then to use that state's law, including its choice of law rules, to determine which state's substantive law would be applied. *Richards v. United States,* 369 U.S. 1 (1961). The government's negligent acts and omissions occurred, presumably, in the state of North Carolina where the FAA allowed John W. Stroup to have and use a mechanic's certificate with a powerplant rating. The government's negligent omissions to warn Plaintiffs' decedent that the day after the subject aircraft was certified as airworthy by John W. Stroup, the FAA found it necessary to exercise its emergency powers to revoke his license because he was known to make such certifications fraudulently or with gross negligence occurred in Georgia where John A. Goff, Sr. received no warning of any sort from the FAA. Both North Carolina and Georgia follow the *lex loci delicti* rule, i.e. the law of the place of the tort applies. *Delta Air Lines, Inc. v. Sergeant Industries, Inc.,* 251 Ga. 91 (1983); *Boudreau v. Baughman,* 322 N.C. 331, 368 S.E.2d 843 (1988). In its brief at page 4, the government has reached the right result for the wrong reason.

Georgia has adopted the Restatement (Second) Torts, § 324A as the substantive law of this state. *Huggins*

v. Aetna Casualty & Surety Company, 245 Ga. 248, 264 S.E.2d 191 (1980). The Restatement states as follows:

> Section 324A Liability to Third Person For Negligent Performance of Undertaking
>
> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking if
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of the reliance of the other or the third person upon the undertaking.

Obviously our analysis must begin by establishing that the United States of America has made an undertaking which directly relates to this case. That undertaking arises from the Civil Aeronautics Act, the predecessor to the Federal Aviation Act of 1958, 48 USC § 1301 et seq. The legislature enacted those laws, and most significantly the regulations promulgated thereunder, to promote civil aviation while assuring maximum safety in the air. *Rosenhan v. United States,* 131 F.2d. 932, 934 (10th Cir. 1942), *cert. denied,* 318 U.S. 790. The same purposes were to be effected by the 1958 act. 1958 U.S. Code Cong. & Adm. News, P.3741. The preamble to that legislation describes it as:

> An act to continue the Civil Aeronautics Board as an agency of the United States, to create a Federal Aviation Agency, to provide for the regulation and promotion of civil aviation in such manner as to best foster its development and safety, and to provide for the safe and efficient use of the airspace by both civil and military aircraft, and for other purposes.

All of the Federal Aviation Regulations have been put into effect pursuant to the powers created by the Federal Aviation Act of 1958. Pursuant to the Federal Aviation Regulations and the Federal Aviation Act of 1958, the Federal Aviation Administration has promulgated its own internal rules and regulations including the Compliance and Enforcement Program, Order 2150.3. That order establishes clear, non-discretionary, acts which must be undertaken by the FAA employee in carrying out the FAA's legally mandated undertaking. Some pertinent portions of that order read as follows:

> Chapter 2 Enforcement Objectives and Policy 205. Determining the type of legal enforcement action.
>
> C. *Certificate Action — Revocation*
>
> (1) Revocation of a certification or a rating should be sought in all cases where there is lack of capability or other discrepancy incapable of immediate correction; in cases where the certificate holder has demonstrated by repeated offenses and unwillingness or inability to comply with the principles of air safety; and in cases where the continued exercise by the individual of the privilege of the certificate would be detrimental to the public interest. For example, revocation should be sought in cases; there an aircraft is used for smuggling or transporting narcotics or where there is falsification of records.
>
> (2) In cases involving organizations, revocation should be sought where their conduct demonstrates a lack of qualification; i.e., deliberate and flagrant violations; falsifications of records.
>
> D. *Other Recommended Action*

In addition to the recommendation for legal enforcement action, the field office should determine the possible need for any additional or special enforcement action and, when appropri-

ate, submit such recommendations to the regional office. This may include:

> (1) *Emergency suspension or revocation of certificates.*
>
> (a) Emergency action in suspending or revoking a certificate or manufacturing approval should be taken ONLY when it is clearly needed in the public interest and must be taken immediately when the need for such action is recognized. The emergency authority will not be used for punitive reasons. Evidence for such action must show a lack of qualification or that the certificate holder likely will continue exercising the privileges of the certificate.
>
> (b) The following are examples of when emergency action might be appropriate.
>
> . . . .
>
> 5. *When the holder of a repair station certificate returns unairworthy aircraft to service, and it is determined that they do not have an inspection system that will Produce satisfactory quality control.* (Emphasis added.)

This undertaking is made by the United States of America at the Department of Transportation level through the Administrator of the Federal Aviation Administration.

That the pilot and passengers aboard the subject aircraft were intended to be protected by these Federal Aviation Regulations is abundantly clear from previously decided cases. *E.g., Arney v. United States,* 479 F.2d 653 (9th Cir. 1973). In that case the pilot and passenger were injured in a crash which allegedly resulted from negligent inspection and negligent granting of an airworthiness certificate by FAA inspectors. In reversing the district

court, and holding that summary judgment was inappropriate, the Court stated:

> The purpose of the certification of aircraft under the 1958 Act and regulations was to reduce accidents, and the government may be liable for negligence in improper issuance of a type airworthiness certificate.... The safety of pilots and others aboard aircraft, as well as persons on the ground, depends on the airworthiness certification program under the Act. We hold that the appellants, Arney and Baker were within the class intended to be protected by the regulations and that the alleged harm suffered was of the kind which the regulations were intended, in general, to prevent. The accident which occurred was exactly the sort of risk that might reasonably be anticipated to flow from violation of the Act and the regulations promulgated thereunder.

Arney at 658. In the case presently before this Court, the same analysis is appropriate and equally true. The purpose of certifying mechanics and giving some of them an inspection authorization allowing them to certify an aircraft as airworthy was clearly to reduce accidents. The government is liable for its negligence in improperly allowing an unqualified person to continue exercising the privileges of the mechanic's certificate with a powerplant rating and inspection authorization. Certainly the safety of pilots and passengers depends on the airworthiness certification program under the Act. The signing off of a log book indicating that an aircraft is airworthy by the holder of the FAA certificate and ratings is the front line operational end of the airworthiness certification program.

Further proof that the United States has made this undertaking can be found in the case of *Gibbs v. United States,* 251 F.Supp. 391, 400 (E.D. Tenn. 1965) where it is stated:

> Having decided to enter the broad field of the regulation of the flight and repair and modification of aircraft and licensing of pilots, the Government becomes responsible for the care with which those activities are conducted.

There can be no mistaking the fact that the United States of America has made the requisite undertaking.

The second aspect of the restatements formulation is that the government should recognize that the undertaking is necessary for the protection of third persons. Absent competent regulation of those who maintain our aircraft, there would be no meaningful standard of safety to protect pilots and passengers. While it should receive no argument that the United States "should" recognize its undertaking as being necessary for the protection of pilots and passengers, it is clear that the government not only "should" recognize this necessity, but it does in fact recognize this necessity. That fact is borne out by the all-encompassing Federal Aviation Regulations and the orders promulgated thereunder, all for the purpose of protecting pilots and passengers as well as persons on the ground.

Once the Defendant has made an undertaking which it should recognize as necessary for the protection of a third person, it will be subject to liability to the third person for physical harm resulting from its failure to exercise reasonable care to protect his undertaking if one of three conditions exist: 1) Its failure to exercise reasonable care increases the risk of such harm, *or* 2) It has undertaken to perform a duty to the third person, *or* 3) The harm is suffered because of reliance of the other or the third person upon the undertaking.

By allowing an utterly incompetent and dishonest mechanic to continue overhauling and inspecting aircraft engines in direct contravention of its own regulations, the FAA has clearly increased the risk of the harm which should be anticipated from such a failure to exercise reasonable care, the very harm which occurred in this case.

A separate basis on which liability can be predicated is that the harm is suffered because of reliance of the pilots and passengers upon the FAA's undertaking. Reliance in this case is abundantly clear, but, moreover, it is legally mandated by the Federal Aviation Regulations themselves. Before any pilot is authorized to operate an aircraft he is required by law to determine that it has been signed off as airworthy by a mechanic having the appropriate certification and ratings. Section 91.29 of the Federal Aviation Regulations (14 CFR § 91.29) simply states that "no person may operate a civil aircraft unless it is in an airworthy condition." The pilot makes the determination, in relevant part, by referring to the aircraft or engine logbook to see if the recent maintenance, overhaul, or inspection has been "signed off" by an aircraft mechanic having the FAA seal of approval, i.e., an aircraft mechanic with a mechanic's certificate with a powerplant rating and an inspection authorization. FAR § 43.7 states as follows:

> Section 43.7 Persons authorized to approve aircraft, airframes, aircraft engines, propellers, appliances, or component parts for return to service after maintenance, preventive maintenance, rebuilding or alteration.
>
> (a) Except as provided in this section and § 43.17, no person, other than the administrator, may approve an aircraft, airframe, aircraft engine, propeller, appliance or component part for return to service after it has undergone maintenance, preventive maintenance, rebuilding or alteration.

(b) The holder of a mechanic's certificate or inspection authorization may approve an aircraft, airframe, aircraft engine, propeller, appliance or component part for return to service as provided in Part 65 of this chapter.

The federal law further provides that:

Section 43.5 Approval for return to service after maintenance, preventive maintenance, rebuilding or alteration.

No person may approve for service any aircraft, airframe, aircraft engine, propeller, or appliance, that has undergone maintenance, preventive maintenance, rebuilding or alteration unless —

(a) The maintenance record entry required by § 43.9 or § 43.11, as appropriate has been made;

(b) The repair or alteration form authorized by or furnished by the Administrator has been executed in a manner prescribed by the Administrator; and

(c) If a repair or an alteration results in any change in the aircraft operating limitations or flight data contained in the approved aircraft flight manual, those operating limitations or flight data are appropriate revised and set forth as prescribed in 91.31.

Because the federal government monopolizes this area of activity by promulgating rules which absolutely limit the way in which an aircraft is put back in service, the government has guaranteed that all pilots and passengers must stake their lives on reliance that the FAA would carry out its undertaking to assure that only competent and non-fraudulent mechanics overhaul engines and certify them as airworthy. The FAA's complete occupation of this field of endeavor is so pervasive that the federal law preempts state law. 49 USC § 1305; O.C.G.A. § 6-2-1.

Two cases, which dealt with the government's liability under the theory of Restatement (Second) Torts Section 324A and each of which found that the government owed a duty to the injured crew and passengers when it failed to exercise ordinary care in carrying out its

own inspection and certification programs are *S. A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines) v. United States*, 692 F.2d 1205 (9th Cir. 1982) *rev'd on other grounds* in 467 U.S. 797 (1984) and *United Scottish Insurance v. United States*, 692 F. 2d 1209 (9th Cir. 1982), *rev'd on other grounds* 467 U.S. 797 (1984). In the Varig case, the government sought to escape liability by relying on the same case *sub judice: Clemente v. United States*, 567 F.2d 1140 (1st Cir. 1977), *cert. denied* 435 U.S. 1006, 98 Sup. Ct. 1876, 56 L.Ed 2d 388 (1978). In rejecting that argument, the Ninth circuit held as follows:

> A statute, 49 USC § 1421, requires that the FAA conduct a comprehensive inspection for compliance with all safety regulations before a certificate of airworthiness will issue. Aircraft purchasers rely upon these inspections.
>
> The United States, through the FAA, has voluntarily undertaken the inspection and certification of all civilian aircraft. The Federal Aviation Act of 1958, 49 USC § 1301 et seq., requires the FAA "to promote safety of flight of civil aircraft in air commerce" and to perform its duties "in such manner as will best tend to reduce or eliminate the possibility, or recurrence of accidents in air transportation. . . ." 49 USC § 1421. The Act provides for a mandatory certification procedure, 49 USC § 1423, and the FAA has established design criteria that every aircraft must meet before being certified for flight.
>
> Members of the flying public may not know the specific contents of FAA regulations. There is general knowledge that regulations designed to assure optimum safety exist and that the United States inspects each aircraft for compliance. The public knows that the government "grounds" aircraft until questions about safety are resolved. The United States should expect that members of the public will rely on the proper performance by the FAA of its duty to inspect and certify. Under California law, a private person inspecting and certifying aircraft for airworthiness would be liable for negligent inspection under the state's Good Samaritan rule. It follows that the United States also falls within the rule. Even without

> reference to the Good Samaritan rule, we have indicated that an action against the government will lie in a negligent inspection and certification case. *Arney v. United States*, 479 F.2d 653, 661 (9th Cir. 1973).
>
> The United States contends that if it comes under this rule it will be liable for every accident resulting from an activity subject to government safety regulations. This argument is not persuasive. The United States will be liable only when injury has resulted from the negligent performance of its duty. The voluntary assumption of the inspection and certification function carries with it the duty to inspect and certify with reasonable care.

Varig at 1208. The analysis can be no different in the case *sub judice*. Based on the statutes and regulations and orders cited above, the government through the FAA has undertaken the inspection and certification of mechanics and aircraft inspectors who in turn provide for the safety of flight just as critically as design considerations provide for the safety of flight. The Ninth Circuit has recognized the very same reliance on this undertaking that the Plaintiffs herein now urge this Court to find.

In *United Scottish Insurance,* the Ninth Circuit addressed an identical issue concluding as follows:

> As the government itself acknowledges, the FAA's regulatory activities are performed for the public as a whole. When voluntarily performing activities solely for the safety of the public, the FAA performs a service for others. *See, Arney v. United States,* 479 F.2d 653 (9th Cir. 1973)....
>
> The district court, in holding that victims relied on the FAA inspection correctly pointed out that the relationship FAA inspectors have with pilots, owners and passengers is imbued with reliance. The United States, until it voluntarily undertook to do so, had no duty to occupy the field of aircraft inspection and certification. Having chosen to make aircraft safety inspections and to certify the results, the government reasonably could expect that members of the public

> would rely on the government's certification of airworthiness [cite omitted]. The careful performance of aircraft inspections is the essence of the government's duty, once the inspections are undertaken. *In re: Air Crash Disaster Near Silver Plume, Colo.,* 445 F.Supp. 384 (D. Kan. 1977.)
>
> The district court's analysis of service and reliance under the Good Samaritan rule were therefore free from error.

United Scottish Insurance at 1211. Again, the same analysis should apply to the case at bar. In this case, the government has undertaken to regulate, manage and inspect the system of individuals who perform aircraft maintenance and inspect aircraft for airworthiness and that undertaking of service to others is every bit as real, and is relied on just as much, as the FAA's program for certification of airworthiness in other areas. Another case holding the United States government liable where an analogous undertaking was involved is found in *Indian Towing Company, Inc. v. United States,* 350 U.S. 61 (1955). (Involving the negligent inspection of a lighthouse).

As further support for the proposition that the passengers as well as the pilot would be entitled to the same duty from the government, it should be noted that the Restatement (Second) of Torts requires that "the harm is suffered because of the reliance of the other or the third person upon the undertaking." The Georgia Supreme Court has held that this particular language will be given effect under Georgia law. That holding arises in the context of a negligent inspection by an insurance company. *Hudgins v. Aetna Casualty & Surety Company,* 245 Ga. 248, 264 S.E.2d, 191 (1980). That case, incidentally, adds further support to the fact that this sort of cause of action is recognized as applying to nongovernment parties under Georgia law.

It is also clear under Georgia law that mere use of the aircraft is sufficient to demonstrate reliance by the pilot and passenger on the FAA's safety inspection system. *See, Universal Underwriters Insurance Company v. Smith,* 253 Ga. 588, 322 S.E.2d 269 (1984).

Whether it is called the "Good Samaritan doctrine," or Section 324A of the Restatement (Second) of Torts or the "negligent inspection doctrine," this principle of law is firmly entrenched in Georgia jurisprudence. Plaintiffs' Complaint, therefore, clearly states a claim or cause of action upon which relief will be granted against the United States of America and, contrary to the Motion to Dismiss filed by the Defendant, it cannot be said as a matter of law that no duty exists running from the FAA to the decedents.

II.

THE FEDERAL AVIATION ADMINISTRATION ALSO OWES A DUTY TO THE PLAINTIFFS' DECEDENTS DERIVED FROM THE FACT THAT IT HAD ACTUAL CONTROL OVER JOHN W. STROUP'S RIGHT TO OVERHAUL AND INSPECT AIRCRAFT ENGINES.

Contrary to Defendant's Brief in Support of its Motion to Dismiss, there is yet another totally independent and fully supportable duty which the FAA owed to the Plaintiffs' decedents in this case and which is clearly recognized under Georgia law. As a background for any discussion on the topic of "duty", it is instructive to review the fundamentals. *Prosser and Keeton on Torts,* (5th Ed., Ch. 9 § 53 Duty) provides a clear and concise discussion of that concept. In one case the Georgia Su-

preme Court has articulated the general obligation of legal duty in the following way:

> The legal duty in this case arises out of the general duty one owes to all the world, not to subject them to an unreasonable risk of harm. This has been expressed as follows: "... Negligence is conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm." Restatement, Torts, 2d, § 282.

Bradley Center, Inc. v. Wessner, 250 Ga. 199, 296 S.E.2d 693 (1982). It is Plaintiffs' contention that the FAA could very easily, in the exercise of ordinary care, have revoked John W. Stroup's license or, in the alternative, the FAA could very easily have, in the exercise of ordinary care, refused to reinstate his certificate after it had been revoked the last time. In so doing, the FAA would have exercised ordinary care for the protection of others against unreasonable risk of harm that would result from use of an aircraft engine that had been either negligently or fraudulently overhauled and/or either negligently or fraudulently inspected. It is the FAA's long standing, repeatedly reinforced, actual express knowledge of John W. Stroup's dangerous propensities that gives rise to this duty. The duty to prevent him from being authorized to overhaul and inspect engines is further enhanced by the fact that the FAA had it within its complete, exclusive control to shut down this man's operation. Failure to act reasonably under all the circumstances is negligence.

Prosser and Keaton goes on to discuss a specific area of duty relating to "controlling conduct of others." The examples are numerous and familiar:

> Other relationships are custodial by nature, requiring the Defendant to control his charge and to guard other persons against his dangerous propensities. Thus, the owner of an automobile is in such a position to control the conduct of the one who is driving it in his presence that he is required to act reasonably to prevent negligent driving. A tavern

> keeper must act reasonably to prevent intoxicated patrons from injuring others. An employer must prevent his employee from throwing objects from his factory windows, and this had been extended quite generally to include an obligation on the part of any occupier of premises to exercise reasonable care to control the conduct of anyone upon them, for the protection of those outside. A franchisor may be liable for negligently permitting its franchisee to cheat the customers. The physician in charge of an operation may be liable for failure to prevent the negligence of his assistants. A hospital may be liable for permitting an unqualified doctor to treat a patient on its premises. The same rule has been applied to hospitals and psychotherapists who have charge of dangerous mental patients, and to those who have charge of dangerous criminals. A common application of the principle is found in the liability of parents for failure to exercise proper control over their children, ... Yet, in the absence of the requisite relationship, there generally is no duty to protect others against harm from third persons.

Prosser and Keaton, p. 383-385 and cites included therein.

The same principle is set out in the Restatement (Second), Torts § 319 which states as follows:

> One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.

The Georgia courts have already incorporated this type of duty into the Georgia law. *Bradley Center v. Wessner,* 161 Ga. App. 57, 580, 287 S.E.2d 716 (1982), *aff'd,* 250 Ga. 199, 296 S.E.2d 693 (1982). In the *Bradley* case, a psychiatric facility had control over a man whom they knew had dangerous propensities. In spite of that knowledge, the psychiatric facility allowed the man to leave and he ultimately murdered two people outside of the facility. The Defendant argued that it had no duty to those third parties who were murdered. The Supreme Court found that a duty certainly existed because the psychiatric

facility had control of the situation and in the exercise of ordinary care it would have prevented the unreasonable risk of harm to the decedents. The exact same analysis is applicable to the case *sub judice*. The FAA knew of the dangerous propensities of John W. Stroup for many years prior to his overhauling and inspecting the engine which caused the deaths of the Plaintiffs herein. The FAA not only had that knowledge, but it also had complete control of the situation. Not only did the FAA have the power to revoke John W. Stroup's certificate, it also had an affirmative undertaking to do so under its own rules and regulations. For this Court to find that a duty existed in the present circumstances would not be at all inconsistent with other decisions finding a duty based on a similar rationale with respect to the United States of America. *Gibson v. United States*, 457 F.2d 1391 (3rd Cir. 1972); *Jablonski v. United States*, 712 F.2d 391 (9th Cir. 1983).

Plaintiffs' allegation that Defendant failed to carry out its duty to warn the Plaintiffs' decedents may fall within this general category of cases. At the time the FAA revoked John W. Stroup's certificate on October 2, 1987, the FAA knew or should have known that there was a serious risk that he had just recently completed work, in a grossly negligent or fraudulent fashion, on someone's aircraft engine. A simple review of his records and a telephone call to the owners of the subject aircraft would have alerted them to the fact that the individual who had just completed the work on their engine, and who had just inspected their engine was having his certificate revoked on an emergency basis due to his fraudulent and grossly negligent habits concerning the overhaul and inspection of engines. One telephone call would have saved four lives. Yet the FAA takes the position that it had no duty to make the telephone call. Even in the case relied on most heavily by the Defendant, *Sellfors v. United States*, 697 F.2d 1362 (11th Cir. 1983), the theory that the FAA

was liable for failure to warn pilots of birds in the vicinity failed, not as a matter of law, but because "there was no evidence that the air traffic controllers had sighted any birds immediately prior to the accident." *Sellfors* at 1365. *See, also, Safeco Insurance Company of America v. City of Watertown, South Dakota*, 529 F. Supp. 1220 (N.D.S.D. 1981) wherein the city government was found negligent in failing to warn pilots of the presence of gulls in the vicinity of the airport.

III.

RESPONSE TO DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS

As indicated above, the United States has made the correct choice of law although for the wrong reason. Georgia law should apply.

Defendant asserts that pursuant to the *Sellfors, supra* case, "municipalities are not liable for the negligence of their officers in the performance of governmental functions." While that is a correct statement of law, it has absolutely nothing to do with the case presently under consideration. The government' s argument has already been put to rest in other cases, and there is no reason to re-litigate that issue. *Indian Towing Company v. United States*, 350 U.S. 61 (1955). The test simply is not whether a Georgia municipality would be held liable.

The government next argues that the only possible basis for liability would be under the Good Samaritan doctrine. The Court will note that there is no citation of authority in support of that argument and the preceding portions of this brief amply delineate alternative theories under which a duty would be established.

The government next argues that any undertaking involved in this case is one in which the government has

undertaken only for its own benefit without invoking Good Samaritan liability. While the government certainly cites to cases where the factual situation involved an undertaking for the government's benefit and not for the benefit of the general public, those cases are distinguishable from the case *sub judice*. Three of the four cases relied upon by the government arise in a construction environment where the government was involved in a contract with an independent contractor. In each of those cases the United States, through its contract, retained the right to inspect the project so as to insure that the contractor fulfilled the contract. The United States made no undertaking to provide for the safety of workers on the job site. *Musgrave v. Tennessee Valley Authority*, 391 F.Supp. 1330, 1331 (N.D. Ala. 1975); *Roberson v. United States*, 382 F. 2d 714 (9th Cir. 1967); *Beason v. United States*, 396 F.2d 2 (5th Cir. 1968). The fourth case relied on by the government is *Moody v. United States*, 774 F.2d 150 (6th Cir. 1985) *cert. denied*, 479 U.S. 814 (1986). In that case purchasers of real estate pursuant to the Farmers Home Administration provisions sued the government when, after several government inspections of their prospective property, the property turned out to be unsuitable. In those cases the government had undertaken to inspect the property only for the purpose of protecting the government's own security interest in the homes, and there was a statute expressly setting out that fact. All four of these cases are clearly distinguishable from the present case because in the present case the United States of America has affirmatively undertaken to provide for the safety of pilots and passengers by setting itself up as the only entity which regulates and inspects the quality of aircraft mechanics. Each of these four cases turns on the fact that the government has not made an undertaking which could inure to the benefit of the Plaintiffs, whereas in aviation cases, the courts have held that the government has made

the requisite undertaking which would inure to the benefit of pilots and passengers. *Arney v. United States*, 479 F.2d 653, 658 (9th Cir. 1973); *Clemente v. United States*, 567 F.2d 1140, 1149 (1st Cir. 1977); *United Scottish Insurance v. United States*, 692 F.2d 1209, 1211 (9th Cir. 1982), *rev'd on other grounds; Varig Airlines v. United States*, 692 F.2d 1205, 1208 (9th Cir. 1982), *rev'd on other grounds; see also, Indian Towing Company v. United States*, 350 U.S. 61.

Next the government claims that although it set up the elaborate and comprehensive system of regulating and monitoring air safety and aviation maintenance that the government would have no reason to think that this service was necessary for the protection of others. On its face, of course, this assertion is incorrect. Obviously, proper maintenance of aircraft and aircraft engines is essential for the protection of others. The government, however, seeks to bolster this argument by suggesting that the owner and operator of an aircraft has an obligation to determine whether that aircraft is airworthy. While the owner and operator of the aircraft certainly does have such an obligation, that fact in no way relieves the government of its liability. The pilot and owner of the aircraft must exercise reasonable care based on all the information available. In order for the pilot and owner to determine whether the aircraft is in an airworthy condition, they refer to the logbook and verify that the aircraft has been returned to service by a mechanic certified by the Federal Aviation Administration as being capable and competent to return the aircraft to service. Nowhere can there be found any case law which obligates the pilot to disassemble the engine and double check the mechanic's work before he flies the airplane. Such a requirement would be patently absurd. Not surprisingly, the courts have recognized that the government's argument in this case is specious. *Flader v. Simonsen*, 148 Colo. 480, 366 P.2d 678 (1961); *see also, Hartz v. United States*, 387 F.2d

870 (5th Cir. 1968); *United States v. Schultetus*, 277 F.2d 322 (5th Cir. 1960) *cert. denied*, 364 U.S. 828.

For the same reason, the government's argument that the decedents' reliance, if any, can only be on the pilot/owner of the aircraft is beside the point. In support of its argument, the government cites to *Frank v. United States*, 250 F.2d 178 (3rd Cir. 1957), *cert. denied; Patentas v. United States*, 687 F.2d 707 (3rd Cir. 1982) and *Sellfors v. United States*, 697 F.2d 1362 (11th Cir. 1983). The *Frank* case involved the Coast Guard's unsuccessful attempt to rescue a drowning sailor. The sailor obviously did not throw himself overboard on reliance that the Coast Guard would be there to save him. The *Patentas* case involved the Coast Guard's allegedly negligent inspection of an oil tanker. The claimants had no knowledge that there was a problem requiring inspection and the claimants had no knowledge of the purpose of the inspection, and consequently, they could not have relied on that inspection. Further, there was no course of dealings over time which would have given the Plaintiffs a reason to expect or rely on such an inspection. In *Sellfors,* there was similarly no evidence that the pilot, *Sellfors,* relied upon federal grant agreements or that he even knew such agreements existed. The federal grant agreements were entered into between the United States of America and DeKalb County and were not part of an overall national scheme providing for the safety of airports. Where the government has undertaken to provide for safety, as it has in the present case, it has uniformly been found liable. *E.g., Indian Towing Company, supra; Arney, supra; Hartz, supra; Schultetus, supra.*

The government next argues, pursuant to *Sellfors,* that under the Georgia Good Samaritan doctrine, the cases have "uniformly held that where one does not create the dangerous condition and takes no remedial measures,

he is not liable as a Good Samaritan." *Sellfors* at 1368. The government overlooks the fact that in the present case the FAA created the dangerous condition by issuing a mechanic's certificate to a man they knew had previously performed fraudulent overhauls and who they knew from many years of experience to be incompetent. The FAA clearly created the dangerous condition in this case. Beyond that, moreover, the FAA did undertake remedial measures: the FAA revoked this man's certificate. The FAA undertook those remedial measures in a negligent fashion by not revoking the certificate sooner and by not following the revocation with a warning to persons who would most likely be affected.

Finally, the government relies on Judge Freeman's decision in *Howell v. United States,* Civil Action No. 1:88-CV-1930-RCF in his order of December 11, 1989. That Order is presently under appeal. Due to some logistic confusion, that Order was entered before the Court received any opposition from the Plaintiffs although the Plaintiffs' opposition was filed on a timely basis. (The Order was actually issued on the last day the Plaintiffs had in which to respond). In the *Howell* case the Court concluded that the pilot and passengers could not have relied on Mr. Richards' inspection. If the Court is correct that the pilot and passengers did not know of Mr. Richards having discovered contamination in the fuel, then they certainly could not have relied on his actions. In the case presently before the Court, the pilot and passengers rode in the airplane in full and knowing reliance on the fact that the aircraft had been returned to service as airworthy by a mechanic authorized to make such determinations by the FAA. Merely riding in the airplane establishes the necessary reliance and alteration of position in reliance to satisfy the Georgia law in that regard. *Universal Underwriters Insurance Company v. Smith,* 253 Ga. 588, 591, 322 S.E.2d 69 (1984).

By way of further argument, the Plaintiffs' incorporate herein the Plaintiffs' brief in a companion case, which brief is also being served on this date. That case is *Smith, et al. v. United States,* Civil Action No. 3:89-CV-147-GET.

IV.

CONCLUSION

For all of the above-stated reasons, it cannot be held as a matter of law that the Plaintiffs' Amended Complaint fails to state a claim or cause of action upon which relief could be granted, and therefore, this Court clearly has jurisdiction under the Federal Tort Claims Act and it should accordingly deny the Defendant's Motion to Dismiss.

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